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TWIN CITY FIRE INSURANCE COMPANY

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

CROWLEY MARITIME CORPORATION,)
Plaintiff,)
vs.)
FEDERAL INSURANCE COMPANY; TWIN)
CITY FIRE INSURANCE COMPANY; RLI)
INSURANCE COMPANY; and DOES 1-20,)
inclusive,)
Defendants.)
) Case No. CV-08-00830 SI
[Hon. Susan Illston]
**DEFENDANT AND
COUNTERCLAIMANT TWIN CITY
FIRE INSURANCE COMPANY'S
OPPOSITION TO CROWLEY
MARITIME CORPORATION'S
OBJECTION TO NEW EVIDENCE
SUBMITTED WITH REPLY PAPERS
AND MOTION TO STRIKE**
DATE: August 22, 2008
TIME: 9:00 a.m.
PLACE: Courtroom 10

Rather than address specific issues raised by Twin City Fire Insurance Company (“Twin City”) and Federal Insurance Company (“Federal”) in their Motion to Disqualify, Plaintiff and Counterdefendant Crowley Maritime Corporation (“Crowley”) attached a series of declarations to its Opposition, which Twin City can only assume were proffered to confuse the Court. Then, in its Objections to New Evidence Filed with Reply Papers and Motion to Strike, Crowley complains when Twin City and Federal Insurance Company’s (“Federal’s”) respective Replies in Support of the Motion to Disqualify demonstrate the inaccuracies of those declarations. Crowley cannot have it both ways.

A simple reading of Twin City’s Reply makes clear that the Declaration of Michael F. Perlis (the “Perlis Declaration”) filed with the Reply, and the exhibits attached thereto, are all provided and cited to as direct responses to assertions in Crowley’s Opposition and the declarations Crowley filed therewith. Further, the Declaration of Henry Nicholls (the “Nicholls Declaration”) filed with Federal’s Reply responds directly to Crowley’s version, proffered by Crowley in a declaration attached to its Opposition, of a key conversation between Nicholls and Crowley’s counsel, Richard Shively. The declarations and exhibits filed with the Insurers’ Replies only rebut what Crowley has placed in issue in its own First Amended Complaint and in its Opposition and supporting documents. As such, the Nicholls Declaration and the Perlis Declaration and attached exhibits are entirely proper under Local Rule 7-3(c) and Federal Rule of Civil Procedure 6(c)(2).

A. Twin City’s Reply, p. 12

Crowley attached the declaration of Richard Vernon Smith (the “Smith Declaration”) to its Opposition. In the declaration, Mr. Smith asserts that “it is pure speculation for the Insurers to assert that the \$17.265 million Crowley is claiming as a settlement payment to the plaintiffs exceeded the maximum possible recovery by the minority stockholders who comprised the plaintiff

1 class [in the underlying Franklin Fund action].” (Smith Declaration, ¶ 9, cited in Twin City’s
 2 Reply, p. 12 n. 13).

3 In response, Twin City cites to two pleadings filed in the underlying Franklin Fund
 4 litigation and attached as exhibits to the Perlis Declaration: Crowley’s *Brief in Opposition to*
 5 *Plaintiffs’ Application for Attorneys’ Fees and Plaintiffs’ Brief in Support of the Proposed*
 6 *Settlement.* (Twin City’s Reply, p. 12 n. 13, citing Perlis Declaration Exs. C and D). Both of these
 7 pleadings indicate that the maximum amount recoverable at trial would be considerably less than
 8 the \$17.265 million Crowley claims as a settlement payment, and are offered for the clear and
 9 appropriate purpose of rebutting Mr. Smith’s assertion, made under penalty of perjury, re the
 10 maximum possible recovery in the Franklin Fund litigation.

13 **B. Twin City’s Reply, p. 14**

14 Crowley’s Opposition asserts that the Franklin Action settlement was not binding on
 15 Crowley as of the date of the March 28, 2007 Letter to the Insurers because “[t]he Delaware Court
 16 of Chancery did not even approve the settlement until April 27, 2007” and “[b]y its own terms, the
 17 proposed settlement did not become final until June 3, 2007.” (Opposition, p. 5, citing Smith
 18 Declaration, ¶ 6 and Ex. A. at p. 9, ¶ 5).

19 In response to Crowley’s claim that the settlement was not binding on Crowley because the
 20 Delaware court had not approved it, Twin City cites to three documents from the Franklin Fund
 21 action and attached to the Perlis Declaration: 1) a Proposed Scheduling Order scheduling the
 22 settlement approval hearing, filed with the Delaware Court before the Insurers were notified of the
 23 settlement; 2) the Delaware Court’s Order approving the hearing date; and 3) a letter from declarant
 24 Jon Abramczyk, Crowley’s counsel in the Franklin Fund action, enclosing the Proposed
 25 Scheduling Order and Stipulation of Settlement and describing such as the “agreed-upon
 26

1 Stipulation of Settlement and related papers[.]” This letter was also filed with the Delaware Court
 2 prior to the date on which Crowley notified its insurers of the settlement. (Twin City’s Reply, p. 14,
 3 citing Perlis Declaration, Exs. A, B, and E). Twin City provided these documents for the express
 4 and appropriate purpose of rebutting Crowley’s assertion that the Franklin Fund settlement was not
 5 binding on Crowley on March 28, 2007 because the Delaware Court had not approved it.
 6

7 **C. The Declaration of Henry Nicholls**

9 Crowley also seeks to exclude the Nicholls Declaration filed with Federal’s Reply on
 10 grounds that “the Insurers addressed the conversation between Mr. Nicholls and Mr. Shively...in
 11 the opening memoranda, so they were the ones who put the conversation at issue” and further notes
 12 that Nicholls’ declaration should not affect the Court’s ruling on the pending motion because,
 13 “however one parses it, testimony from Mr. Shively on his telephone conversation with...Mr.
 14 Nicholls, is not at the heart of this case.” (Crowley’s Objections and Motion to Strike, p. 2). These
 15 arguments carry no weight. In the declarations attached to its Opposition, Crowley has sought to
 16 promote its own version of the conversation with Henry Nicholls and now seeks to preclude the
 17 Insurers from offering Henry Nicholls’ version of the conversation, which happens to be consistent
 18 with the Insurers’ request for coverage as memorialized in the March 28, 2007 Letter already
 19 before this Court¹ in that neither the Nicholls Declaration nor the Letter indicate that Crowley
 20 sought indemnity payments or payment for the Franklin Fund settlement amount.
 21

23 First, contrary to its assertions in the Opposition, Crowley itself put the conversation with
 24 Mr. Nicholls in issue, as this conversation is key to Crowley’s claims against Federal. (*See*
 25 Crowley’s First Amended Complaint, ¶¶ 8, 12, 13).

27
 28 ¹ See Declaration of Michael F. Perlis filed with Twin City’s Motion to Disqualify, Ex. A.

1 Second, the contents of the conversation are clearly in dispute. In its Answer to Crowley's
 2 First Amended Complaint, Federal denied Crowley's version of the conversation. (Federal's
 3 Answer, ¶ 8). Furthermore, Crowley itself has admitted that the details of the conversation are in
 4 dispute. In his declaration filed with Crowley's Opposition (the "Pillsbury Declaration"), Philip L.
 5 Pillsbury declares that at the time of the case management conference, "[he] disputed Twin City's
 6 counsel's contention that the defendants are entitled to summary judgment on the 'consent to settle'
 7 issue because, among other reasons, a dispute may exist as to whether Federal orally expressed its
 8 consent to the proposed settlement during an April 5, 2007 telephone conversation between
 9 Federal's Henry Nicholls and my co-counsel Richard Shively." (Pillsbury Declaration, ¶ 3).

10 Third, in his declaration attached to Crowley's Opposition (the "Shively Declaration"),
 11 Richard Shively presents his own version of the conversation between himself and Nicholls,
 12 (Shively Declaration, ¶¶ 5-7), which Nicholls' own declaration seeks to clarify and correct.
 13 (Nicholls Declaration, ¶ 3).

14 It is fundamentally unfair to allow Crowley to attach declarations supporting its own
 15 version of a conversation going to a key, contested coverage issue without allowing the Insurers to
 16 proffer their own evidence to the contrary in their Replies. One can only assume that Crowley's
 17 motive for opposing inclusion of the Nicholls Declaration is to obscure the fact that the declaration
 18 is consistent with Crowley's request for coverage as set forth in the March 28, 2007 letter to the
 19 Insurers (which Crowley has admitted sending – see Crowley's Answer to Twin City's
 20 Counterclaim, ¶ 12). The Nicholls Declaration and the Letter both indicate that in March and early
 21 April 2007, Crowley sought coverage for fees and costs alone. There was no suggestion about
 22 paying the settlement amount. (Nicholls Declaration, ¶ 4; March 28, 2007 Letter (attached as
 23 Exhibit A to the Perlis Declaration filed with Twin City's Motion to Disqualify)). This truth is
 24 inconvenient for Crowley, hence its eagerness to bury the Nicholls Declaration.
 25
 26
 27
 28

1 In Crowley's view, the Insurers' duty to avoid introducing new factual issues in their
2 Replies translates to a duty to avoid addressing any of the factual or legal contentions made in
3 Crowley's Opposition and attached declarations. This argument is ridiculous, as is the notion that
4 in their Motion, perhaps through telepathy, the Insurers should have addressed the factual
5 assertions in an Opposition and attached declarations that had not yet been filed or even written.
6 Local Rule 7.3(c) permits a replying party to attach an affidavit to its Reply papers, and it is
7 entirely proper under the Federal Rules to do so. *See Terrell v. Contra Costa County*, 232 Fed.
8 App. 626, 629 n. 2, 2007 WL 1119331, *2 (9th Cir. Apr. 16, 2007) (Reply evidence is not "new"
9 when it responds to factual assertions in the Opposition).

10 For these reasons, Twin City respectfully requests that this Court deny Crowley's Motion to
11 Strike and that the Nicholls Declaration and the Perlis Declaration and attached exhibits remain
12 part of the record.

13 DATED: August 20, 2008

14 Respectfully submitted,

15 STROOCK & STROOCK & LAVAN LLP

16 Michael F. Perlis

17 Richard R. Johnson

18 Rachael Shook

19 By:

20 _____
21 /s/ Michael F. Perlis

22 Michael F. Perlis

23 Attorneys for Defendant/Counterclaimant
24 TWIN CITY FIRE INSURANCE
25 COMPANY

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF SAN FRANCISCO)
SS

I am employed in the County of Los Angeles, State of California, over the age of eighteen years, and not a party to the within action. My business address is: 2029 Century Park East, Los Angeles, CA 90067-3086.

On August 20, 2008, I served the foregoing document(s) described as: **DEFENDANT AND COUNTERCLAIMANT TWIN CITY FIRE INSURANCE COMPANY'S OPPOSITION TO CROWLEY MARITIME CORPORATION'S OBJECTION TO NEW EVIDENCE SUBMITTED WITH REPLY PAPERS AND MOTION TO STRIKE** on the interested parties in this action as follows:

William Campbell Morison-Knox
Morison-Knox Holden Melendez & Prough LLP
500 Ygnacio Valley Rd., Suite 450
Walnut Creek, CA 94596
Fax: (925) 937-3272

- (VIA U.S. MAIL)** In accordance with the regular mailing collection and processing practices of this office, with which I am readily familiar, by means of which mail is deposited with the United States Postal Service at Los Angeles, California that same day in the ordinary course of business, I deposited such sealed envelope, with postage thereon fully prepaid, for collection and mailing on this same date following ordinary business practices, addressed as set forth above.
 - (VIA FACSIMILE)** By causing such document to be delivered to the office of the addressee via facsimile.
 - (VIA OVERNIGHT DELIVERY)** By causing the document(s), in a sealed envelope, to be delivered to the office of the addressee(s) at the address(es) set forth above by overnight delivery via Federal Express, or by a similar overnight delivery service.

I declare that I am employed in the office of a member of the bar of this court, at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 20, 2008, at Los Angeles, California.

Lore Pekrul
[Type or Print Name]

/s/ Lore Pekrul
[Signature]